

COPYRIGHT ARBITRATION ROYALTY PANEL

+ + + +

LIBRARY OF CONGRESS

+ + + +

HEARING

+ + + +

In the Matter of:

Adjustment of the Rates for
Noncommercial Educational
Broadcasting Compulsory
License

Docket No. 96-6
CARP NCBRA

Library of Congress
James Madison Building
101 Independence Avenue, S.E.
Room LM414
Washington, D.C. 20540

Tuesday,
March 17, 1998

The above-entitled matter came on for
hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE LEWIS HALL GRIFFITH, Chairperson
THE HONORABLE EDWARD DREYFUS
THE HONORABLE JEFFREY S. GULIN

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

ORIGINAL

APPEARANCES:On Behalf of Broadcast Music, Inc.:

JOHN FELLAS, ESQ.
NORMAN C. KLEINBERG, ESQ.
MICHAEL E. SALZMAN, ESQ.
of: Hughes, Hubbard & Reed, LLP
One Battery Park Plaza
New York, New York 10004-1482
(212) 837-6075 (JF)
6680 (NCK)
6833 (MES)

and

JOSEPH J. DiMONA, ESQ. (Asst. V.P.)
MARVIN L. BERENSON, ESQ.
Legal and Regulatory Affairs
BMI
320 West 57th Street
New York, New York 10019-3790
(212) 830-3847

On Behalf of ASCAP:

I. FRED KOENIGSBERG, ESQ.
PHILIP H. SCHAEFFER, ESQ.
J. CHRISTOPHER SHORE, ESQ.
SAMUEL MOSENKIS, ESQ.
of: White & Case, LLP
1155 Avenue of the Americas
New York, New York 10036-2787
(212) 819-8740 (PHS)
8394 (JCS)

BEVERLY A. WILLETT, ESQ.
ASCAP Building
Sixth Floor
One Lincoln Plaza
New York, New York 10023
(212) 621-6289

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

APPEARANCES (continued):On Behalf of ASCAP:

JOAN M. McGIVERN, ESQ.
Assistant Vice President of Legal
Affairs
Office of the CEO
ASCAP
One Lincoln Plaza
New York, New York 10023
(212) 621-6289

On Behalf of the Public Broadcasters:

R. BRUCE RICH, ESQ.
JONATHAN T. WEISS, ESQ.
MARK J. STEIN, ESQ.
TRACEY I. BATT, ESQ.
ELIZABETH FORMINARD, ESQ.
of: Weil, Gotshal & Manges, LLP
767 Fifth Avenue
New York, New York 10153-0119
(212) 310-8170 (RBR)
8885 (JTW)
8969 (MJS)
8405 (TIB)

and

KATHLEEN COX, ESQ. (General Counsel)
ROBERT M. WINTERINGHAM, ESQ. (Staff Atty)
Corporation for Public Broadcasting
901 E Street, N.W.
Washington, D.C. 20004-2037
(202) 879-9701 (KC)
9707 (RMW)

and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

APPEARANCES (continued):On Behalf of the Public Broadcasters:

GREGORY FERENBACH, ESQ.,
(Vice Pres. & Acting General Counsel)
ANN W. ZEDD, ESQ. (Asst. Gen. Counsel)
KAREN C. RINDNER, ESQ. (Asst. Gen.
Counsel)
PBS
1320 Braddock Place
Alexandria, Virginia 22314
(703) 739-5063 (GF)
5170 (AWZ)

NEAL A. JACKSON, ESQ.
DENISE B. LEARY, ESQ.
GREGORY A. LEWIS, ESQ.
Deputy General Counsel
National Public Radio
635 Massachusetts Avenue, N.W.
Washington, D.C. 20001
(202) 414-2000 (NPR)
2049 (DBL)

ALSO PRESENT:

GINA GIUFFREDA, CARP Specialist
TAMALA T. BOYD, Legal Assistant,
White and Case
ALBERT ALDERETE, Legal Assistant,
Weil, Gotshal & Manges, LLP

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

OPEN SESSION

1434

I-N-D-E-X

WITNESS DIRECT CROSS REDIRECT RECROSS

Bruce Owen

By Mr. Kleinberg	1436		1529	
			1542	
By Mr. Rich		1462		1539
By Mr. Schaeffer		1538		

Janet McFadden

By Mr. Salzman	1548			
By Mr. Weiss		1567		
Voir Dire by Mr. Weiss on page 1548				

EXHIBIT NO. DESCRIPTION MARK RECD

PB

18X	Owen Testimony	1484
19X	Notice of Appearance	1550

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 P-R-O-C-E-E-D-I-N-G-S

2 (9:30 a.m.)

3 CHAIRPERSON GRIFFITH: Ladies and
4 gentlemen, good morning.

5 Let the record reflect, please, that the
6 Court Reporter has been previously sworn and she
7 remains under oath.

8 I'm a little disappointed. Mr. Kleinberg
9 wore his green tie yesterday --

10 (Laughter.)

11 -- instead of today. But other than that,
12 Happy St. Patrick's Day to you.

13 MR. KLEINBERG: Thank you, Your Honor.

14 CHAIRPERSON GRIFFITH: Just one other
15 mention. We indicated we would start at 10:00 on
16 Thursday. We can start at 9:30 if you wish. Is that
17 agreeable with everyone?

18 MR. KLEINBERG: It is with us. Yes.

19 CHAIRPERSON GRIFFITH: Mr. Schaeffer
20 didn't hear me, since he is talking back there. Do
21 you agree to that, Mr. Schaeffer?

22 MR. SCHAEFFER: I'm sorry. I was not

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 paying attention.

2 CHAIRPERSON GRIFFITH: Okay. Mr.

3 Schaeffer agrees.

4 (Laughter.)

5 How about starting at 9:30 on Thursday?

6 MR. SCHAEFFER: That's fine.

7 CHAIRPERSON GRIFFITH: Fine?

8 MR. SCHAEFFER: Fine with us.

9 CHAIRPERSON GRIFFITH: All right. Fine.

10 All right. Dr. Owen, if you will raise
11 your right hand, please, sir.

12 WHEREUPON,

13 BRUCE M. OWEN

14 was called as a witness by Counsel for Broadcast
15 Music, Inc., and, having been first duly sworn,
16 assumed the witness stand, was examined and testified
17 as follows:

18 DIRECT EXAMINATION

19 BY MR. KLEINBERG:

20 Q Would you state your name, please, for the
21 record?

22 A Bruce M. Owen.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Q Dr. Owen, what is your current occupation?

2 A I am President of Economist, Incorporated.

3 Q And what is Economist, Incorporated?

4 A An economic consulting firm based here in
5 Washington.

6 Q And could you give the Panel a brief
7 review of your educational background, please?

8 A I have a bachelor's degree from Williams
9 College and a Ph.D. in economics from Stanford
10 University.

11 Q And can you tell us what you have done in
12 the way of teaching?

13 A I have been on the economics faculty at
14 Stanford, on the faculty of the Business School and
15 the Law School at Duke, and I now teach part-time at
16 Stanford's Washington campus.

17 Q And am I correct that you served as the
18 Chief Economist at the Antitrust Division of the
19 Department of Justice?

20 A Yes.

21 Q And when was that?

22 A 1971 to 1981.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Q And were you --

2 A 1979 to 1981.

3 Q And were you also Chief Economist of the
4 White House Office of Telecommunications Policy?

5 A Yes.

6 Q And have you written any books that deal
7 with the subject matter of media, broadcast media, for
8 example?

9 A Yes.

10 Q What is that?

11 A Well, two probably of closest relevance
12 are television economics and video economics.

13 Q And have you been involved professionally
14 as an economist with consulting assignments dealing
15 with television and radio broadcasting?

16 A Yes.

17 Q Have you testified before as an expert
18 with respect to music licensing in a music licensing
19 case?

20 A Yes.

21 Q And which case was that?

22 A Buffalo Broadcasting.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Q And I believe your written testimony
2 indicates you testified before a CARP proceeding
3 involving satellite carrier royalty rates?

4 A Yes.

5 MR. KLEINBERG: I would tender Dr. Owen as
6 an expert economist, and if there is any voir dire.

7 CHAIRPERSON GRIFFITH: All right. Do you
8 have any voir dire?

9 MR. SCHAEFFER: I have no voir dire.

10 CHAIRPERSON GRIFFITH: Mr. Rich?

11 MR. RICH: No, Your Honor.

12 CHAIRPERSON GRIFFITH: All right.

13 BY MR. KLEINBERG:

14 Q Dr. Owen, could you tell us what your
15 assignment was from BMI with respect to your testimony
16 here today?

17 A I was asked to estimate what a market-free
18 -- what a subsidy-free market royalty rate would be
19 for BMI.

20 Q And when you use the phrase "subsidy
21 free," what do you mean?

22 A Well, "subsidy fee" means the rate that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 would be -- the rate that would prevail in a market
2 transaction where there was no -- there was no subsidy
3 flowing from one side to the other.

4 Q Now, in your written testimony, you
5 indicated that you were looking for comparable market
6 transactions as part of carrying out your analysis to
7 arrive at this estimate of a subsidy-free royalty
8 rate, is that correct?

9 A Yes.

10 Q Could you explain what you considered in
11 terms of these comparable market transactions?

12 A Well, I looked for comparable market
13 transactions that would require the least amount of
14 adjustment to make them truly comparable to what the
15 market rate would be for BMI Music used by public
16 broadcasting.

17 Q And did you arrive at a determination of
18 what the comparable market transactions that you were
19 going to look at were?

20 A Well, I arrived at a determination that
21 the fees paid by commercial broadcasters were the best
22 available benchmarks to use for estimating what the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 BMI royalty rate would be in a non-subsidized market
2 environment.

3 Q And why did you look at the commercial
4 broadcasting industry as a comparable situation?

5 A Well, there are a lot of similarities
6 between public broadcasting and commercial
7 broadcasting, starting with the fact that they both
8 broadcast. They both involve the broadcast of
9 audiovisual entertainment and information to mass
10 audiences. They both involve the use of program
11 inputs that are similar, the same kinds of actors and
12 directors and sound stages and music.

13 They have the same or similar program
14 categories. They compete, to some extent, for
15 commercial sponsorship. They use programming to
16 compete for some of the same audiences.

17 MR. SCHAEFFER: I'm having trouble hearing
18 you.

19 CHAIRPERSON GRIFFITH: Dr. Owen, could you
20 keep your voice up, please?

21 THE WITNESS: I'll do my best.

22 And, finally, they are comparable in terms

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 of -- commercial and public broadcasting are
2 comparable in terms of their bargaining power vis-a-
3 vis BMI, because both of them bargain with BMI on a
4 collective basis rather than individual stations
5 bargaining when it comes to the blanket license. The
6 commercial stations bargain through the All Industry
7 Committee, and the public stations bargain through
8 CPB.

9 BY MR. KLEINBERG:

10 Q Now, you mentioned that you looked --
11 among the similarities were that they were both
12 audiovisual. That was with respect to television, I
13 take it?

14 A Yes.

15 Q How about the radio side?

16 A Well, the radio side, they are somewhat
17 less comparable. In particular, the mix of
18 programming is quite different in radio between public
19 and commercial. But many of the rest of these
20 similarities are the same.

21 Q Now, in your written testimony, you
22 indicated that you had concluded that the best

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 available indicator was the payments made by the
2 commercial television radio broadcasting industries.
3 Did you also look at and consider the previous
4 agreement between BMI and the public broadcasters, in
5 terms of its reliability as an indicator of what the
6 subsidy-free market transaction would be?

7 A Yes.

8 Q And what were your conclusions in that
9 respect?

10 A My conclusions were that the previous
11 royalty rate is a somewhat less reliable benchmark
12 than current commercial rates. The reason for that is
13 as was given I gather yesterday in the written
14 testimony of Mr. Willms. The circumstances
15 surrounding the 1992 negotiation made that negotiation
16 difficult to compare with current conditions.

17 In particular, there was no contrast to
18 current conditions. There was no comparable market-
19 determined commercial rate to serve as a context for
20 the negotiation of public television or public
21 broadcasting rates.

22 I understand that BMI thought that the use

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 of music by -- use of its music by public broadcasting
2 was substantially less than it was at the time -- it
3 actually was at the time and still less than it is
4 now. And the context of the negotiations was such
5 that the ASCAP agreement had already been entered
6 into, and it did not appear to be cost effective to
7 try and negotiate a higher BMI fee, given the
8 likelihood that the ASCAP fee would be seen as a cap.

9 Finally, the commercial rates today give
10 us as a benchmark four different bargaining outcomes,
11 whereas this, the 1992 fee, would give us just one
12 observation. What I mean by that is that the fees
13 that BMI receives from commercial broadcasters today
14 are the result of bargains with three networks plus
15 the stations, four separate negotiations, whereas the
16 1992 transaction was through a single negotiation.

17 So for all of those reasons, I think the
18 1992 outcome is less reliable as a benchmark than
19 commercial rates today are.

20 Q And the four separate negotiations you
21 were referring to were on the television side,
22 obviously, the three television networks and the --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 A Yes.

2 Q -- local television, and on the radio side
3 there were the radio negotiations?

4 A That's right.

5 Q Now, turning to your analysis with respect
6 to the estimate of the fee for public television,
7 could you explain the methodology that you utilized in
8 terms of analyzing the commercial TV television market
9 and any adjustments that you made with respect to that
10 analysis?

11 A Yes. I start with the use of the
12 commercial as the starting point of the benchmark.
13 But then, of course, it is necessary to adjust that
14 for the differences, the important differences between
15 commercial broadcasting and public broadcasting. And
16 there are four factors that I looked at in terms of
17 making those adjustments.

18 The first was the extent of use of BMI
19 music. To the extent that one or the other medium
20 used more BMI music than the other, one would expect,
21 other things equal, that the license fee would be
22 higher for the one that used the more music.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Second, program expenditures. It seems to
2 me reasonable that music fees, as a percentage of
3 program expenditures, would be about the same on
4 public broadcasting and commercial broadcasting. It
5 would be surprising to find a big difference, just as
6 I would expect to find the other factors of production
7 to be roughly the same proportion of program
8 expenditures.

9 So to the extent that one or the other
10 spends more money on programming, I would expect the
11 one with the higher expenditure to have higher music
12 fees.

13 Q Doctor, what do you mean by "programming
14 expenditures"?

15 A I mean expenditures on programming as
16 opposed to other kinds of expenditures made by
17 broadcasters.

18 Q Including purchase of programming from
19 outside --

20 A Purchase and production of programming.

21 Q Thank you.

22 A As reported by the entities.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Q Okay. That is two factors.

2 A The third factor is revenues. Revenues
3 are a measure of ability to pay. They reflect demand,
4 and perhaps most important they are a proxy or a check
5 on the expenditures. You would be surprised to find
6 that music fees as a percentage of revenues were very
7 different between the two -- between the two media,
8 between public and commercial television.

9 The final measure is audience. The size
10 of an audience is a measure of the effectiveness of
11 the programming, and, therefore, the effectiveness of
12 the inputs into the programming. And I would expect,
13 other things equal, that larger audiences would be
14 associated with greater expenditure on music, along
15 with other inputs.

16 Q Dr. Owen, could you go through your --
17 well, strike that.

18 You did reach a determination as to what
19 you concluded was a reasonable range of fees for BMI
20 license fees for public television, correct?

21 A Yes.

22 Q And what was that conclusion?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 A The conclusion is that the -- the
2 reasonable range within which to set the BMI fee is
3 between four and seven percent of the fees paid by the
4 commercial broadcasters -- sorry, the commercial
5 television broadcasters.

6 Q And in dollars, that would equal what?

7 A It turns out that that is \$4- to \$7
8 million in round numbers.

9 Q Could you explain to the Panel how you
10 arrived at that conclusion with respect to your
11 analysis of the four factors that you have just
12 described?

13 MR. KLEINBERG: And I think also I will
14 have to, at this point, close the hearing to the
15 executive -- we have to go into executive session.

16 CHAIRPERSON GRIFFITH: All right. Are
17 there any individuals in the room that should be
18 excluded?

19 All right. Thank you.

20 (Whereupon, the proceedings went
21 immediately into Executive Session.)
22

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 CHAIRPERSON GRIFFITH: We're ready when
2 you are.

3 BY MR. RICH:

4 Q I take it you understood your assignment,
5 Dr. Owen, to be to establish what a subsidy-free
6 royalty rate should be for BMI for the period covered
7 by this proceeding, is that right?

8 A Yes.

9 Q Is that the same in concept as
10 establishing a rate that approximates what a free
11 market would establish?

12 A I think I have heard it described as
13 establishing what a willing buyer would pay a willing
14 seller. Sure, that's the general idea.

15 Q That is the general idea in a transaction
16 that is marked -- not marked by any coercion of any
17 kind involving the buyer or the seller, is that right,
18 a free arms length transaction?

19 A Well, by a commercial transaction.

20 JUDGE GULIN: Would fair market rate be
21 another way of saying --

22 THE WITNESS: The rate that would result

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 in a commercial transaction with no subsidy, yes.
2 Commercial transactions have all kinds of bargaining
3 power involved on one side or the other, and I am
4 trying to come at that question from the point of view
5 of the relative bargain -- taking into account the
6 relative bargaining power of the two sides, just as in
7 commercial broadcasting.

8 BY MR. RICH:

9 Q Now, in your written testimony in which
10 you identify commercial broadcasters as a suitable
11 proxy -- I think that was your word -- for identifying
12 the appropriate market level, I am correct, am I not,
13 that you cite the following factors in examining the
14 historic relationship between commercial broadcasters
15 and BMI as bearing on your conclusion? One is the
16 fact that there have been -- that these have been arms
17 length negotiations. You do cite that, correct?

18 A The ones I am using as a benchmark, yes.

19 Q And you also cite the ones you use as a
20 benchmark as being the product of mutual consent,
21 correct?

22 A Yes.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Q And you also identify those transactions
2 as not having been imposed by a court or other outside
3 party, correct?

4 A Right.

5 Q And you also indicate that they reflect a
6 long history of negotiation between the parties,
7 correct?

8 A Yes.

9 Q Those are all factors which militate, I
10 take it, in favor of using such prior negotiations as
11 proxies, to use your term, for the fees to be set
12 here, is that correct?

13 A Yes.

14 Q And you reject, in turn, the Public
15 Broadcasters' own prior fee experience in favor of
16 this proxy approach, is that correct?

17 A I think it is less reliable, yes.

18 Q Less reliable.

19 And you indicate that you relied, for
20 purposes of understanding the circumstances and
21 context of what occurred in the last BMI-Public
22 Broadcaster negotiation, on the written testimony of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Mr. Willms of BMI, is that correct?

2 A Yes.

3 Q I take it from that you have made little
4 or no independent examination as to those
5 circumstances?

6 A Well, to some extent I am familiar with
7 the circumstances from other sources. But basically,
8 I am relying on his testimony, yes.

9 Q What other sources are you relying on?

10 A Well, I'm generally aware of some of the
11 context of the litigation, the Rate Court proceeding
12 that ASCAP was involved in, that sort of thing.

13 Q You were not a consultant to BMI at the
14 time of the negotiations in 1992, for example, were
15 you?

16 A No.

17 Q And do you have any knowledge whether the
18 1992 agreement which was reached between BMI and
19 Public Broadcasters was the first such agreement
20 between those parties?

21 A I believe it was not.

22 Q And so when Mr. Kleinberg identified an

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 agreement -- singular -- to you, that was not
2 intended, I take it, to suggest that there has been
3 but a single prior negotiation between the parties,
4 correct? That is, between public broadcasting and
5 BMI?

6 A I don't know what he intended. I didn't
7 understand it that way.

8 Q You understand, in fact, there to have
9 been how many prior agreements between these parties?

10 A Several. I don't know the exact number.

11 Q Do you know -- you don't know the number?

12 A No.

13 Q Do you know when they were entered into?

14 A I can't recite the years.

15 Q Do you know when the first such agreement
16 dates back to?

17 A Sometime in the '70s, I think.

18 Q You made no investigation of that?

19 A No.

20 Q It wasn't relevant to your analysis?

21 A No. I considered the 1992 circumstances
22 because that was the closet one.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Q Did you examine the pattern of prior fees
2 over, say, the past 20-year period as between BMI and
3 the Public Broadcasters?

4 A No.

5 Q Did you make any inquiry as to what
6 circumstances surrounded, putting aside the 1992
7 negotiations, the fees that were entered into
8 beginning in 1978 for the period 1978 through 1982?

9 A My understanding, based on Mr. Willms'
10 testimony, is that all of the transactions were
11 clouded or overshadowed by various kinds of
12 litigation.

13 Q Is it your understanding that Mr. Willms
14 identified factors and changed circumstances covering
15 a 20-year period or covering the period from 1992 to
16 the present?

17 A I guess my understanding is chiefly
18 focused on 1992.

19 Q Yes.

20 A I have the impression from Mr. Willms or
21 elsewhere that that litigation didn't begin in 1991.

22 Q What independent knowledge do you have of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the state of finality or lack of finality of
2 commercial broadcaster license arrangements with ASCAP
3 and BMI from the period 1978 to the present?

4 A My understanding is that the first
5 litigation-free final transactions were reflected in
6 the 1996 revenues.

7 Q What is --

8 A That is, the three networks and the 1996
9 to 1999 station agreement.

10 Q What is your understanding as to the
11 history of the commercial radio industry's negotiation
12 and litigation experience with ASCAP and BMI?

13 A My previous answer was for television.
14 There are some commercial transactions with -- with
15 radio.

16 Q Dating back 20 years, yes?

17 A Yes. Or dating back some time. I don't
18 know exactly how long.

19 Q And what is your understanding with
20 respect to the state of finality of the ABC, CBS, and
21 NBC television network license arrangements with BMI
22 over the past 20 years?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 A That until the most recent set of
2 agreements they were all either the subject of interim
3 arrangements or temporary in some other way.

4 Q And that understanding is based on what,
5 Mr. Willms' testimony?

6 A Yes.

7 Q Is that based on any independent
8 examination of any other facts?

9 A No.

10 Q Were you shown any copies of any of the
11 network television license agreements with either
12 ASCAP or BMI in preparation for your testimony?

13 A No.

14 Q So you rely entirely on your understanding
15 from Mr. Willms' testimony as to the prior state of
16 those license agreements?

17 A Yes.

18 Q Now, were you present for Mr. Willms'
19 testimony yesterday?

20 A No.

21 Q If I were to advise you that in his
22 testimony yesterday Mr. Willms acknowledged the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 following factors, I'm going to ask you whether this
2 might not cause you to reconsider certain of your
3 premises.

4 Number one, that there has been a long
5 history of negotiated agreements between Public
6 Broadcasters and BMI. Two, that these prior
7 agreements were all negotiated at arms length. Three,
8 that they resulted in prices that both sides accepted.
9 Four, that they were not the product of coercion.
10 And, five, that they were not imposed by a court or
11 other outside party.

12 I'm not asking you to subscribe to that.
13 I'm going to represent to you, for purposes of this
14 question, that Mr. Willms so testified as to each of
15 those points. In those circumstances, would such
16 testimony cause you at least to reconsider whether you
17 need to look any further than BMI's own 20-year
18 history of negotiated agreements with Public
19 Broadcasters in order to arrive at the best market
20 approximating fees for this Panel?

21 A Well, I don't think any of that comes to
22 grips with the reasons that I regard as important for

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 thinking that the 1996 commercial rates are more
2 reliable than the 1992 public broadcasting rates.
3 They don't come to grips with the fact that there was
4 no comparable prevailing commercial final rate that
5 provided a context for the public broadcasting
6 negotiations in 1992, or before that as far as I
7 understand it.

8 They don't deal with the misperception of
9 music use that BMI had that affected its negotiations,
10 at least in 1992. I don't know if that factor applies
11 earlier. And most importantly, they don't come to
12 grips with the structure of the negotiations in 1992
13 under which BMI was faced with what amounted to a fait
14 accompli.

15 That is to say, the ASCAP agreement was
16 done, and if BMI wanted to make any radical change in
17 its -- in its fee, it would have to go to court or to
18 a CARP or a CRT, or whatever the forum was at the
19 time, and spend a lot of money trying to change it in
20 a context where that was not a very likely outcome.

21 None of the things that you recited really
22 came to grips with those factors. And those are the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 factors that I think are most important in my mind in
2 thinking that the 1996 commercial rates are better as
3 an indicator of what the market's subsidy-free rate
4 would be today.

5 Q What do you know about the timing of the
6 BMI 1992 negotiations in relation to the ASCAP 1992
7 negotiations with Public Broadcasters? For instance,
8 do you know whose negotiations commenced before whose?
9 ASCAP in relation to BMI?

10 A The only thing I know about it, or my
11 understanding, is that the ASCAP agreement was
12 finalized first.

13 Q So you have no knowledge as to how it came
14 to be, if it is true, that the ASCAP rate was
15 finalized before the BMI rate in 1992, is that
16 correct?

17 A That is true. My understanding of this
18 comes from Mr. Willms' testimony.

19 Q You don't know, for instance, do you, when
20 the rate that was arrived at with ASCAP was structured
21 with foreknowledge by the parties where the public
22 broadcasting negotiations were going with BMI? You

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 don't know that one way or the other, do you?

2 A I don't know anything about the details of
3 the negotiation.

4 Q Including that fact, is that, right, sir?

5 A I don't know that fact. And the only
6 other fact that I know about it is that ASCAP regarded
7 the -- the transaction as reflecting the disclaimer
8 about precedent that was contained in the agreement.
9 That is, that the agreement wouldn't be used as --
10 against ASCAP in the future as a precedent.

11 Q You know that now, you are saying?

12 MR. SCHAEFFER: I rise to object. If
13 we're going to get into the line of inquiry by Mr.
14 Rich as to what went on within the negotiations which
15 were all confidential, as I understand it, between
16 ASCAP and the Public Broadcasters, that -- the
17 negotiations, as I understand it, were done under the
18 seal of confidentiality. If Mr. Rich has a different
19 view, I would like to find that out now.

20 MR. RICH: I don't think we'll have a
21 problem here, Mr. Schaeffer.

22 MR. SCHAEFFER: Thank you.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 BY MR. RICH:

2 Q Dr. Owen, just to follow on your last
3 observation, is it your understanding that at the time
4 BMI concluded its deal in 1992 with public
5 broadcasting it was aware of the no precedent language
6 that you have just cited that existed in the ASCAP
7 license agreement?

8 A No. It didn't need to be. All it needed
9 to be aware of is what the ASCAP agreement was.

10 Q Perhaps I misunderstood you. I thought
11 you to be suggesting that a reason that BMI understood
12 in 1992 that its own deal was not market approximating
13 was its knowledge that, in turn, the deal it was tied
14 to was not market approximating.

15 A No, that's the reason for us to think that
16 now.

17 Q With the benefit of hindsight?

18 A Sure.

19 Q And not with the benefit of looking at a
20 series of 20-year negotiated arms length agreements
21 between the parties, correct?

22 A Correct.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Q Okay. Now, I take it, then, that one of
2 your premises here as an economist is that the fact
3 that ASCAP was involved for a period of time in
4 litigation concerning rates for local television
5 broadcasters -- that that fact prevented BMI from
6 determining the fair market value of its own repertory
7 in relation to Public Broadcasters. That's your
8 testimony, correct?

9 A That certainly was an important factor
10 that made it more difficult to evaluate it, yes.

11 Q And you're not making that as an
12 independent evaluation or judgment. You are relying
13 on Mr. Willms' testimony so stating, correct?

14 A Yes.

15 Q Isn't it a fact, Dr. Owen, in your
16 experience that all kinds of agreements are
17 consummated in the marketplace where the parties lack
18 perfect information about the prices that may
19 ultimately be charged by their competitors for similar
20 goods and services?

21 A Certainly.

22 Q And is it, nonetheless, your testimony

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 that in order to arrive at an agreement in those
2 circumstances that reflects reasonable value in
3 relation to customer X, the seller must have perfect
4 knowledge concerning its competitor's prices as to
5 customers Y and Z, is that the essence of your
6 testimony?

7 A No, I'm not. I'm suggesting that since we
8 want to estimate what the rate would be in a
9 commercial environment today when it is known what the
10 arms length, litigation-free commercial rates are that
11 that is more useful than looking at a fee that is
12 determined in the past when that information was not
13 available.

14 Q I believe you also testified that a factor
15 which cuts against the reliability or desirability of
16 relying on prior public broadcasting-BMI arrangements
17 is the fact that BMI now contends its music share has
18 increased, is that correct? You cite that in your
19 written testimony, I believe?

20 A BMI, as I understand it, contends that its
21 music share has increased and that it, in 1992,
22 thought that it was even -- thought that it was lower

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 than it actually was.

2 Q But that factor taken by itself doesn't
3 have any bearing, does it, on whether back in 1992,
4 based on the best information then available -- music
5 use and otherwise -- those agreements were or were not
6 fair market approximating, correct? It's a changed
7 circumstance?

8 A Right. That factor by itself is a changed
9 circumstance. And other things equal, it would
10 suggest a higher fee today than in 1992.

11 Q But it would not suggest or bear on the
12 reasonableness of the fee then negotiated back in '92,
13 would it, by itself?

14 A All of these factors distinguish 1992 from
15 1996 in terms of whether the outcome is likely to be
16 different, other things equal.

17 Q My question is slightly different. My
18 question is whether you rely on the assertion by BMI
19 that its music use share has increased from 1992 to
20 the present as a factor to discount, for purposes of
21 analysis, as reasonable or not as of 1992 the fee that
22 BMI entered into with Public Broadcasters?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 A I don't know that I have a conclusion as
2 to whether the 1992 fee was reasonable or not. I am
3 only concerned with whether or not it's an adequate
4 benchmark for estimating the 1997 fees.

5 JUDGE GULIN: When you cite music use
6 misconception or increase as a reason for not using
7 the prior agreement as a benchmark -- I guess the
8 question is, is that really a reason why it shouldn't
9 be used as a benchmark, or is that simply a reason why
10 it should be adjusted now?

11 THE WITNESS: Well --

12 MR. RICH: Thank you. It was better asked
13 than I asked it.

14 THE WITNESS: I guess the best response to
15 that is that that was a factor that undoubtedly
16 entered into Mr. Willms' decision not to litigate the
17 1992 outcome. And since the sums involved were
18 relatively small compared to litigation costs, a more
19 accurate view of what the music use percentage
20 actually was might have led to a different decision.

21 BY MR. RICH:

22 Q Do you have any knowledge of the accuracy

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 or inaccuracy of the data that were then relied on in
2 1992, music use data?

3 A My impression is that they were not very
4 accurate by current standards.

5 Q And your impression is derived from?

6 A I can't remember where I got that, whether
7 I read it in Mr. Willms' testimony or somewhere else.

8 Q You have made no analysis comparing the
9 supposition of the parties in 1992 versus what you
10 term "the actual factor," correct?

11 A Correct.

12 Q You also testify at page 4 of your written
13 testimony, as I understood it, that the past fees paid
14 to BMI by Public Broadcasters are inappropriate as a
15 guide to fee-setting here because ASCAP's fees may
16 change in this proceeding, is that correct?

17 A Yes.

18 Q Now, doesn't that again beg the question
19 whether the previously negotiated fees between the
20 Public Broadcasters and either or both of ASCAP and
21 BMI represented voluntary market transactions
22 reflecting the fair value of those rights for the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 period covered then, not now?

2 A It doesn't address that question. That's
3 correct.

4 Q Now, I believe you acknowledged both in
5 your written and oral testimony, Dr. Owen, that this
6 is not the first time you have testified on behalf of
7 a performing rights organization, correct?

8 A Correct.

9 Q You, in fact, provided testimony in the
10 Buffalo Broadcasting antitrust proceeding, correct?

11 A Yes.

12 Q And you were there testifying as well on
13 BMI's behalf, is that correct?

14 A That's correct.

15 Q And you took an oath and testified
16 truthfully in that case, I take it, yes?

17 A Yes.

18 Q And in that case, on direct examination by
19 Mr. Sisk, I believe it was, of Hughes, Hubbard & Reed,
20 BMI's counsel, you had occasion to testify with
21 respect to the way prices are set in the television
22 music marketplace, correct?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 A Yes.

2 Q I'd like to show you and actually read
3 into the record about a page of that -- a little over
4 a page of that testimony, and we'll circulate it
5 around. This is pages, of the transcript, on direct,
6 2338 into page 2340. Give a moment for everybody to
7 get it.

8 CHAIRPERSON GRIFFITH: Do you want this
9 marked, or are you just going to read it into the
10 record?

11 MR. RICH: I think we ought to have this
12 marked, Your Honor, as --

13 CHAIRPERSON GRIFFITH: PBX Exhibit 18X.

14 MR. RICH: -- 18X. Thank you.

15 (Whereupon, the above-referred
16 to document was marked as PBX
17 Exhibit No. 18X for
18 identification.)

19 BY MR. RICH:

20 Q Dr. Owen, I am going to be --

21 MR. KLEINBERG: One moment, please. I
22 have looked at it, and what I see is testimony that is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 in the middle of something. There is no even
2 question. The question posed is not included, so I
3 don't even know the -- and the answer appears --

4 MR. RICH: I have --

5 MR. KLEINBERG: -- to start in the middle.

6 MR. RICH: I have the full transcript
7 here, Mr. Kleinberg. And the Panel and the witness
8 certainly are free to -- and you are -- to examine so
9 much of it as you want. This was part of a multi-page
10 colloquy with Mr. Sisk involving why, in Mr. Owen's
11 judgment, the music license marketplace -- television
12 music license marketplace operates competitively.

13 And he gave very serious reasons, and the
14 portion I am focusing you on is where toward -- at
15 line 19 of 2338 you say, "This brings us to the
16 third," and I think you --

17 JUDGE GULIN: Excuse me. Would counsel
18 like an opportunity to review the transcript first?

19 MR. KLEINBERG: I would like to see the
20 question. I have never heard of --

21 CHAIRPERSON GRIFFITH: And if Dr. Owen's
22 wish is to see the entire thing, too, I think he

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 should be permitted to.

2 MR. RICH: I have absolutely no problem
3 with that, Your Honor. We can either run more copies,
4 or I can share this with the witness, and --

5 MR. SCHAEFFER: Well, I've never seen this
6 before either. I don't want to make it more trouble
7 than it's worth, but --

8 MR. RICH: I assure you, the whole --

9 MR. SCHAEFFER: I don't even know if ASCAP
10 was present during this being taken.

11 MR. RICH: I surely expect that the Paul
12 Weiss firm representing ASCAP was eagerly listening.
13 I assure you that --

14 MR. SCHAEFFER: I'll accept your assurance
15 that --

16 MR. RICH: -- the full context of what I
17 am inquiring about and the complete thought is
18 contained in what I am about to read, but I have no
19 interest in hiding the ball from anybody.

20 MR. KLEINBERG: Well, I think it would be
21 useful, since I think the testimony is from 1980 or
22 '81, and it is not exactly like fresh in everybody's

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 mind -- at least not in mine -- so I think the witness
2 should certainly be entitled to see it, and I wouldn't
3 mind seeing it.

4 CHAIRPERSON GRIFFITH: Mr. Rich, let me
5 just inquire one -- Judge Dreyfus has mentioned, would
6 it be possible to go into another area and have it run
7 off so that --

8 MR. RICH: I would prefer, just given the
9 sequence of my examination -- that I do it now.

10 CHAIRPERSON GRIFFITH: Surely.

11 MR. RICH: I think we can run it off very,
12 very quickly, if we could just adjourn for two or
13 three minutes.

14 CHAIRPERSON GRIFFITH: All right. We'll
15 take about a five-minute recess to --

16 MR. SCHAEFFER: Judge, I hate to do this,
17 but can we take a break, because I would like to read
18 it before he puts the questions so I'll know what
19 they're talking about. Just having the copy in front
20 of me to both read and listen at the same time --

21 CHAIRPERSON GRIFFITH: Six minutes, then,
22 Mr. --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 (Laughter.)

2 MR. SCHAEFFER: If that were Mr. Kleinberg
3 and Mr. Rich, that would be necessary. But in my
4 case, I think I need --

5 CHAIRPERSON GRIFFITH: About 10 minutes.
6 How is that?

7 (Whereupon, the proceedings in the
8 foregoing matter went off the record at
9 10:23 a.m. and went back on the record at
10 10:35 a.m.)

11 MR. RICH: I apologize if there was any
12 confusion. What we have done -- and I would propose,
13 Judge Griffith, that we -- is that we redesignate this
14 exhibit to include two additional pages which we have
15 now put in front of the witness and Your Honors,
16 beginning at 2336 through 2340, which I believe gives
17 the adequate context for this question and answer.

18 CHAIRPERSON GRIFFITH: All right.

19 MR. KLEINBERG: I just want to make the
20 following observation. Mr. Rich did kindly provide me
21 with the question, which appears on page 2336, and the
22 question reads, "Now you get to Part 2 over here on

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 page 22," and I don't think really illuminates for
2 present purposes what the context of the questioning
3 is.

4 That being said, if the witness is able to
5 answer Mr. Rich's question, then that is fine. But I
6 think the Panel ought to recognize that we are dealing
7 here with something on a face of it which doesn't even
8 describe what it is that was being responded to,
9 and --

10 CHAIRPERSON GRIFFITH: Mr. Kleinberg, on
11 redirect, can't you bring out what you want to, if
12 necessary?

13 MR. KLEINBERG: I can. That's why I am
14 noting this, just so everyone is aware that -- of the
15 circumstances surrounding this. And, you know, it is
16 from --

17 CHAIRPERSON GRIFFITH: Okay.

18 MR. KLEINBERG: -- testimony from 1981 or
19 '82. So that being said, if the witness can answer,
20 let's proceed.

21 CHAIRPERSON GRIFFITH: Thank you.

22 MR. RICH: May I proceed, Your Honor?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 CHAIRPERSON GRIFFITH: Please.

2 BY MR. RICH:

3 Q Dr. Owen, at 2336, in response to
4 questioning by Mr. Sisk, BMI's counsel, you indicate
5 that -- referring to what I take it was a written
6 submission in that proceeding that you were addressing
7 the question of competition in the music licensing
8 marketplace.

9 A Yes.

10 Q And that you go on to indicate that there
11 are two different kinds of competition, line 8 --
12 really, three, if you include the committee's
13 bargaining power in the marketplace. Do you see that?
14 And you then course through a discussion of the three
15 kinds of competition.

16 For my purposes, I want to focus you
17 beginning at page 2338 on what you describe as,
18 beginning line 19, the third, and I think in my mind
19 the most important, of the three reasons why I think
20 there is price competition in this market. I'm going
21 to keep reading for a bit.

22 "And that is that it doesn't make any

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 economic sense to talk about fixing part of the price
2 of a product. You can't do it. It doesn't work.

3 "What happens in the market for music is
4 that composers and copyright owners are selling music
5 to stations. And in order to do that, they engage in
6 two separate kinds of transactions, two separate
7 negotiations. One is for the performing right, and
8 the other is either for synchronization rights or for
9 a composer for hire contract.

10 "As all the economists in the case agree,
11 the market for synchronization rights and the market
12 for composer for hire contracts is a highly
13 competitive one. That means that it takes the actors
14 in that market take account of performing rights, the
15 expected royalties from the performing rights
16 societies, in setting the prices or negotiating prices
17 that they get for synchronization rights and composer
18 for hire agreements.

19 "If the rewards expected from the
20 performing rights societies go up, the price of
21 synchronization rights and composer for hire
22 agreements will go down.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 "What really matters here is the price of
2 music used on local stations, and that is composed of
3 these two parts. And as long as there are individual
4 negotiations, and a hotly competitive supplying market
5 for part of the price, it is simply impossible to
6 extract monopoly rents or supercompetitive prices for
7 music taken as a whole.

8 "That means that the effective price, the
9 real price, whatever the nominal rate is for ASCAP and
10 BMI distributions, the effective price of performing
11 rights is competitive -- competitively set."

12 You so testified, correct?

13 A Yes.

14 Q And you believe that was true as a matter
15 of economic theory and principle, correct?

16 A Yes.

17 Q Based on your understanding both of
18 television business and of the music performing rights
19 marketplace, correct?

20 A Yes.

21 Q And that testimony you still believe to be
22 true and accurate today?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 A Yes.

2 Q Now, if I understand that testimony, sir,
3 the "effective price" of performing rights, as you see
4 it, is determined by the interaction between the
5 synchronization and performing rights marketplace
6 combined, correct?

7 A The price of music.

8 Q Right.

9 A Overall price of music.

10 Q Overall.

11 A Yes.

12 Q Yes. And so that whatever the, in your
13 words, "nominal price" of performing rights, any under
14 or overpayment in the performing rights marketplace is
15 corrected for in the hotly competitive synchronization
16 rates marketplace, correct?

17 A Yes.

18 Q So as you testified in the Buffalo
19 Broadcasting case, if the royalty for performing
20 rights is too high, then the competitive market for
21 sync rights and composer for hire transactions will
22 fall to offset this possible distortion, resulting in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 an overall price that's appropriate, correct?

2 A Competitive.

3 Q That's competitive.

4 A We're talking about market power and
5 competition.

6 Q Yes. Now, is there any reason why this
7 mechanism would not operate in the other direction --
8 namely, that if the payments for performing rights are
9 too low, that the sync rights in composer for hire
10 markets would not offset this by adjusting upwards,
11 again preserving a competitive overall price? Works
12 in both directions, doesn't it?

13 A I would think so.

14 Q Now, if your proposal for CPB -- pardon
15 me, for PBS and NPR royalties for the 1997 to 2002
16 period is appropriate, I take it this suggests a view
17 that the royalty rates agreed to for prior periods
18 were too low?

19 A They suggest there was a subsidy in prior
20 periods, yes.

21 Q And if, in fact, BMI and ASCAP collected
22 royalties from PBS and NPR for approximately 18 years

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 that were too low, would you agree that the result of
2 this would have been that the composure for hire and
3 synchronization rights agreements about which you
4 testified in the Buffalo Broadcasting case would have
5 adjusted to this by increasing the amount of money
6 that producers of programming would have paid to these
7 composers for the initial upfront rights?

8 A That would be my expectation.

9 Q And under the logic of your antitrust
10 testimony, then, wouldn't the competitive market
11 combined for music -- the sync and performing rights
12 market together -- have ensured that music creators,
13 whether represented by BMI or by ASCAP, received
14 appropriate overall compensation?

15 A Competitive overall compensation.

16 Q Competitive overall.

17 And so, therefore, that would have
18 prevented them from "subsidizing" noncommercial
19 broadcasting, correct?

20 A It would have prevented them from
21 subsidizing noncommercial broadcasting in terms of the
22 overall price of music, but not necessarily in terms

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 of the performing rights.

2 Q And do you think to a composer it matters
3 where their -- what the ultimate genesis of their
4 overall compensation is, sync versus performing
5 rights? What matters, do you suppose, to the
6 composer, where it comes from or what the total is?

7 A I think that they both matter. The
8 composers care about how much they get in discounted
9 expected present value, and they also care about the
10 mix between upfront payments and payments based on
11 future success of the music.

12 The fact that the discounted present value
13 of future earnings is whatever it is doesn't mean they
14 are indifferent to the balance between those two.

15 Q You didn't so testify in the Buffalo
16 Broadcasting case, did you, that it does make a
17 difference? Wasn't the thrust of your testimony that
18 it really doesn't make a difference what the
19 performing rights arena yields in the way of fees,
20 since at the end of the day the effective price won't
21 be affected, and that composers will achieve what a
22 competitive market warrants them achieving?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 A I --

2 Q Can you answer that question, please?

3 A I answered it. The -- the mechanism by
4 which the overall price of music is set competitively
5 raises a different question from whether or not the
6 structure of payments to composers is efficient. A
7 competitive outcome doesn't necessarily mean that the
8 price is going to be different than an inefficient
9 competitive outcome. There are two different issues
10 here -- competition and whether or not -- if you
11 really want to get into this, whether -- whether or
12 not risk is allocated properly.

13 When a composer takes more money up front
14 and less in payments from performing rights, the
15 composer is assuming less risk, and the producer of
16 the program is assuming more risk. Now, it works the
17 same way in reverse.

18 The composers and producers have
19 preferences about that, and a competitive market
20 outcome with respect to that issue determines the
21 overall size of the pie that gets to be split. And if
22 that is inefficient -- I'm sorry -- if that is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 determined inefficiently, then the outcome can still
2 be competitive, but nevertheless different than an
3 outcome that is -- in which risk is allocated
4 efficiently but -- but the two parts of music are
5 competitively determined.

6 And I can't remember whether the risk
7 point was covered 20 years ago in that legislation --
8 in that litigation or not.

9 Q You are not recanting your testimony here
10 to the effect that viewing the marketplace overall,
11 and examining whether composers are achieving
12 competitive music rights fees for their contributions
13 to television programming, what it's relevant to look
14 at is the totality of the synchronization and
15 performing rights payments they received, is that
16 correct?

17 A Not at all.

18 Q And your testimony then was -- and I take
19 it you are not recanting it today -- that even if in
20 the back end the performing rights market yielded fees
21 arguably too low, that will not have an outcome in
22 terms of lowering the "effective price" that composer

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 receives, correct?

2 A It will not change the competitive nature
3 of the overall price of music.

4 Q Because the front end synchronization
5 rights market will adjust upward to compensate,
6 correct?

7 A Yes.

8 Q Now, virtually all of your written
9 testimony, sir, from page 4 on is --

10 JUDGE GULIN: Excuse me. Mr. Rich, do you
11 want to offer in --

12 MR. RICH: Yes. I would like to offer it
13 into evidence at this point.

14 CHAIRPERSON GRIFFITH: Any objection?

15 MR. KLEINBERG: I do object for the
16 reasons I have stated before. I think we had the
17 testimony, so I object to it.

18 MR. SCHAEFFER: Is that being offered for
19 proof of the facts contained in the statement, or is
20 it being offered just for cross examination?

21 MR. RICH: It's being offered consistent
22 with his testimony for representing this witness'

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 views on the subject I just cross examined him on the
2 last five minutes.

3 MR. SCHAEFFER: Is that a limited offer?
4 I'm not quite clear.

5 MR. RICH: I don't know what you're
6 asking, Mr. Schaeffer.

7 MR. SCHAEFFER: The rules seem to provide
8 for -- we're going to be going through this, I guess,
9 again. I just want to get it straightened out. The
10 rules seem to apply for a situation where you are
11 either offering it on cross examination for purposes
12 of impeachment or whether it's part of the substance
13 of the case. And I'm inquiring whether this is
14 offered for those purposes.

15 MR. RICH: I don't grasp the distinction.
16 I think it is being offered as a prior statement by
17 this witness, which I think puts his testimony in
18 proper context.

19 JUDGE GULIN: Because this witness is an
20 appropriate sponsor for this --

21 MR. RICH: Yes.

22 JUDGE GULIN: -- particular document.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 CHAIRPERSON GRIFFITH: The objection is
2 overruled.

3 BY MR. RICH:

4 Q Now, am I correct, Dr. Owen, that
5 virtually the entirety of your written testimony, from
6 the middle point on page 4 forward, is premised on the
7 notion that one must look to BMI's previous license
8 experience with commercial broadcasters to arrive at
9 a reasonable fee here?

10 A That's the most reliable benchmark, yes.

11 Q So if the Panel were to disagree with that
12 fundamental premise, namely that the best proxy is
13 commercial as opposed to noncommercial, your analysis
14 would carry relatively little weight, is that correct?
15 Because by definition it is predicated on such
16 comparison, true?

17 A I would think it would carry much less
18 weight than it does now.

19 Q Yes.

20 A I haven't thought about whether or not the
21 methods could be applied to some other benchmark.

22 Q Yes. Now, you cite certain similarities

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 to the commercial broadcasting industry. Indeed, you
2 indicate that you're aware of both similarities and
3 differences between commercial and non-commercial
4 broadcasting. That is at page 2 of your written
5 testimony, correct?

6 A Yes.

7 Q And you indicate that you sought to
8 measure certain of these similarities and differences
9 in the areas of music usage and overall industry scale
10 -- I think were your words -- yes? Again, at page 2.

11 A Yes.

12 Q And by that, you, as you testified
13 earlier, looked at measures of revenues, programming
14 expenditures, audience share, and music use, correct?

15 A Yes.

16 Q Let me ask you if you considered certain
17 other factors which don't necessarily appear from your
18 written testimony. Looking at the revenue issue on
19 television's side, did you take account of differences
20 in how public television generates revenues from how
21 commercial television generates revenues? Was that at
22 all relevant to your analysis?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 A Well, I thought about it. It's a little
2 bit difficult for me to see how the source of revenue
3 has a lot to do with the nature of the demand for
4 program input such as music.

5 Q Now, let me quote you from the written
6 testimony of another witness in this case. This
7 happens to be an ASCAP witness -- Peter Boyle, who is
8 ASCAP's chief economist, another Ph.D. in economics,
9 and ask you if you agree or disagree with this
10 statement appearing at page 5 of Dr. Boyle's written
11 testimony.

12 He says that, "From a licensing
13 perspective, there is a major difference between
14 commercial and public broadcasting's revenue base; the
15 difference being public broadcasting's receipt of
16 funds from tax base sources such as federal, state,
17 and local governments, and funding from public and
18 publicly-funded colleges and universities." Do you
19 agree that that is a major difference to be taken
20 account of in analyzing comparative revenues?

21 A For what purpose?

22 Q For purposes of fee setting in this case.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 A No.

2 Q You don't agree?

3 A I don't agree.

4 Q Have you examined, Dr. Owen, the
5 comparative ease or difficulty with which commercial
6 versus noncommercial broadcasters can pass along
7 increased music costs totaling, in the case of BMI's
8 request, 700 percent?

9 A I'm sorry. I don't understand your
10 question.

11 Q Have you given consideration,
12 understanding the economics, as I take it you do, of
13 the respective commercial and noncommercial
14 broadcasting industries, the degree of ease with which
15 a significantly enhanced cost of doing business can be
16 passed along in the case of commercial broadcasters
17 through increased advertising rates and income versus
18 noncommercial broadcasting by attempting to secure
19 income from other sources, is that a factor you
20 considered in your analysis?

21 A It's really not -- not very relevant to
22 me.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Q Okay.

2 A But the resources that are available are
3 -- are what they are. And they have to be allocated
4 by the commercial broadcaster or the noncommercial
5 broadcaster to their best use. If the price of one
6 input goes up, there will be adjustments. Less in
7 other inputs will be used, to some extent, and it may
8 be that the price charged to users, whether it's
9 underwriters or government agencies or commercial
10 sponsors, will go up and they will buy less of it. So
11 the total output will go down.

12 All of these things are not especially
13 relevant, given the very tiny part of the total cost
14 of programming that is spent on music. It might be
15 something one would take into account if we were
16 talking about the price of producers or actors or
17 sound stages, or something that makes up the real part
18 of the cost of programming.

19 Q And --

20 A But not music.

21 Q -- from the standpoint of your -- strike
22 that.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 As an economist, would you view an outcome
2 which has the effect of reducing output, as you
3 described it, as a desirable economic effect, all
4 other things being equal?

5 A Sometimes a reduction in output is
6 efficient. It depends on the circumstances.

7 Q And you also indicated, I believe, in this
8 last answer that one outcome can be that other inputs
9 are diminished in terms of available funding, correct?
10 So that, in theory, increased payments on behalf of
11 ASCAP and BMI composers, if that were to happen here,
12 might come at the expense of other production
13 elements, correct?

14 A That's one possible outcome, although as
15 I said, the percentage of the program budgets that was
16 spent on music, even with the requested fee, is so
17 small that that's not likely to be a significant
18 issue.

19 Q And do you know that to be a fact from the
20 standpoint of public broadcasting's operations?

21 A Well, public broadcasting's program
22 expenditure in 1996 was \$587 million, I think. I'd

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 have to look at this to be sure that number is right,
2 but that is approximately it. And we are talking
3 about \$4- to \$7 million for BMI music. That's a
4 pretty small percentage.

5 Q You don't understand this case solely to
6 involve payments to BMI, do you?

7 A That's what I'm testifying about.

8 Q You have no knowledge as to what ASCAP
9 seeks in this case?

10 A No.

11 Q Now, your comparisons to commercial
12 broadcasting, I take it, and the chart that you have
13 done off of those, basically take a snapshot from one
14 or sometimes two recent years, is that correct?

15 A Generally, yes.

16 Q And so your analysis doesn't purport to
17 show any trending over time in terms of the
18 relationship which the ratios you set forth bear in
19 each category, is that correct? In other words, as
20 compared, say, to 1990 and 1993 versus 1997, how
21 historically these percentages line up, you didn't
22 attempt to --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 A In a few cases -- in a few cases that's --
2 that is possible, but generally not.

3 Q That wasn't the purpose of your exercise,
4 was it?

5 A Where there was evidence available that
6 would suggest that some prior year was a poor basis or
7 a less reliable basis for estimating some quantity
8 because of the trends, we tried to take that into
9 account.

10 Q No. But my question -- and maybe I wasn't
11 being very clear. Taking, for example, the audience
12 share statistic, your analysis doesn't reveal, for
13 example, whether in 1990, had you performed the same
14 analysis from comparable data governing that year, how
15 the 4.4 to 5.5 percent of public television as
16 compared to commercial television -- what the number
17 -- what the comparable number would have been, say,
18 five or 10 years ago, correct?

19 A I would have to check the report to see
20 what is in the report. The exhibits to the report
21 have data for a number of years for both public
22 broadcasting and for commercial over-the-air

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 broadcasting. I'm sure it goes back to 1990.

2 Q You would --

3 A And the trend is for public broadcasting
4 audience share as a percentage of total viewing to be
5 roughly flat, whereas commercial television is
6 trending downward, over-the-air broadcasting is
7 trending downward because of the increased cable
8 viewing. So the public broadcasting is trending
9 upward as a percentage of over-the-air broadcasting.

10 Q Can you show me where you depict that
11 information, please?

12 A Well, as I said, I don't know if it's in
13 the report or if it's in the exhibits.

14 Q Look at page 12, please.

15 A If you'll look at Exhibit 47, which is
16 cited in footnote 29, page 1, it gives the public
17 station share, which starting in 1985 is three
18 percent, and then is three percent in every year
19 except about three, where it is four percent.

20 And then if you look at the network
21 affiliates share, starting in 1985 and ending in 1986,
22 there is a substantial downward trend because of --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 because of cable.

2 MR. KLEINBERG: Dr. Owen, what exhibit are
3 you looking at? 47?

4 THE WITNESS: Exhibit 47. That's, for the
5 Panel's reference, in the BMI Volume 2.

6 BY MR. RICH:

7 Q Your table presented in Table 4 of your
8 report depicts a declining audience share in the
9 period for public television as a percentage of
10 commercial in the period '94 to '96, is that correct?

11 A Those three years suggest a declining
12 trend, yes.

13 Q I take it for most, if not all, of the
14 analyses you performed for the years you have the
15 data, BMI or an economist generally retained by BMI
16 could have performed this analysis, say, in 1990 or
17 1991?

18 A I don't know what data were available
19 then.

20 Q Do you have any knowledge that, for
21 example, audience share data were not then available?
22 You've studied the TV industry for many years, have

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 you not?

2 A Audience share data were generally
3 available, yes.

4 Q And have not broadcast television industry
5 revenue estimates been available for many, many years
6 -- TVD and other sources?

7 A There was a period of time when it was
8 difficult to find such information, but generally it
9 has been available.

10 Q For quite a number of years, yes?

11 A There was a period in the -- I've got the
12 years wrong. There was a period when the FCC stopped
13 publishing such data, before commercial services
14 started publishing such data. So it's really very
15 difficult to --

16 Q But at least for the last 10 years there
17 have been --

18 A Yes.

19 Q -- many, many --

20 A Yes, there have.

21 Q -- such estimates, correct?

22 A Yes.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Q And by definition, BMI has been aware of
2 the relative fees it has been receiving from Public
3 Broadcasters and commercial television broadcasters,
4 correct?

5 A I hope so.

6 Q To your knowledge, has BMI ever, before
7 this proceeding, undertaken a comparison of the type
8 you have testified to?

9 A Don't know.

10 Q I'd like, finally, to turn to your
11 television use analysis, beginning at page 6. I
12 believe you indicated that this was the most
13 complicated of your analyses?

14 A Yes.

15 Q Had a lot of moving parts, yes?

16 A Yes.

17 Q Now, you relied on information as to music
18 usage on public and --

19 MR. KLEINBERG: Bruce, excuse me just --
20 this is music use?

21 MR. RICH: Yes. I think we should go
22 confidential. Thank you.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 MR. KLEINBERG: Okay.

2 CHAIRPERSON GRIFFITH: All right. The
3 record will reflect that we are, once again, in
4 executive session.

5 MR. KLEINBERG: Thank you, Your Honor.

6 (Whereupon, the proceedings went
7 immediately into Executive Session.)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 CHAIRPERSON GRIFFITH: Mr. Salzman?

2 MR. SALZMAN: BMI calls as its next
3 witness Janet McFadden.

4 CHAIRPERSON GRIFFITH: Okay.

5 Whereupon,

6 JANET McFADDEN

7 was called as a witness, and having been first duly
8 sworn, assumed the witness stand, was examined and
9 testified as follows:

10 MR. WEISS: Your Honors, if I may, at an
11 appropriate time, I do have a little bit of voir dire
12 for this witness, so when it is appropriate I would
13 like to ask her a few questions.

14 CHAIRPERSON GRIFFITH: All right. I
15 presume that we are no longer in executive session, is
16 that correct?

17 MR. KLEINBERG: That is correct.

18 CHAIRPERSON GRIFFITH: I'm worried about
19 Mrs. McGivern getting away on St. Patrick's Day.

20 MR. SCHAEFFER: She has gotten away, but
21 I think she is in the registrar's office.

22 CHAIRPERSON GRIFFITH: Oh, okay.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

DIRECT EXAMINATION

BY: MR. SALZMAN

Q Please state your name, ma'am.

A My name is Janet R. McFadden.

Q What is your current occupation?

A I am currently a law student at the University of Texas School of Law and I freelance in television production.

Q How long have you worked in television production?

A For more than 20 years.

Q As a television producer, where have you been employed?

A I worked for sixteen years at WGBH, the public television station in Boston, and for three and half years at National Geographic television division.

Q Could you please talk louder if you can?

Your witness, Mr. Weiss.

VOIR DIRE

BY: MR. WEISS

Q Ms. McFadden, your resume indicates that you worked as a summer associate for the law firm of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Drinker, Biddle and Reath in 1997, is that correct?

2 A That is correct.

3 Q That is located here in Washington?

4 A Yes.

5 Q Were you aware that Drinker, Biddle and
6 Reath was at one point, council of record in this
7 proceeding for BMI?

8 A No.

9 Q I would like to show you a document which
10 I will mark for identification as PBS 19, I believe we
11 are up to.

12 CHAIRPERSON GRIFFITH: We are 19X.

13 MR. WEISS: Oh, 19X; thank you

14 (WHEREUPON, THE DOCUMENT
15 REFERRED TO WAS MARKED AS P B S
16 EXHIBIT NO. 19X FOR IDENTIFICATION.)

17 (PAUSE)

18 Q Ms. McFadden, this is a notice of
19 appearance form indicating that the names Michael J.
20 Remington and George Galt of Drinker, Biddle and Reath
21 should be substituted as counsel by our colleagues at
22 Hughes, Hubbard and Reed across the aisle.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Have you ever seen this document before?

2 A No.

3 Q Were you aware that Drinker, Biddle and
4 Reath represents BMI?

5 A Yes.

6 Q Were you aware at the time you were a
7 summer associate at Drinker, Biddle and Reath that BMI
8 was represented by that firm?

9 A Yes.

10 Q Did you have occasion to work with Mr.
11 Remington or Mr. Galt at Drinker, Biddle and Reath?

12 A Yes.

13 Q Did you work with them on matters relating
14 to BMI?

15 A Yes.

16 Q Did you have any occasion to work on this
17 matter when you were a summer associate?

18 A No.

19 Q Drinker, Biddle and Reath still represents
20 BMI in various matters, correct?

21 A I don't know.

22 Q Were you aware that Mr. Remington last

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 week and I believe even today is talking to people on
2 Capitol Hill regarding the very section at issue in
3 this proceeding, Section 182 of the Copyright act?

4 A I haven't talked to anybody at Drinker
5 since I left.

6 Q Have you received an offer to work at
7 Drinker, Biddle and Reath?

8 A Yes.

9 Q Have you accepted that offer?

10 A Yes.

11 MR. WEISS: I have no further questions,
12 Your Honors.

13 (Conclusion of Voir Dire).

14 CHAIRPERSON GRIFFITH: All right. Go
15 ahead.

16 DIRECT EXAMINATION

17 BY: MR. SALZMAN, continued

18 Q You told us just before that you had
19 worked in your television career for WGBH and for
20 National Geographic, correct?

21 A Yes.

22 Q What kind of station is WGBH?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 A WGBH is the public television station for
2 Boston and the eastern Massachusetts area.

3 Q In addition to being a broadcaster, is
4 WGBH also a television program producer?

5 A Yes, very much so.

6 Q Could you just briefly explain that?

7 A They produce, besides a lot of local
8 programming, they produce a lot of national
9 broadcasting for public television; NOVA, Masterpiece
10 Theater, Front Line, American Experience, a lot of
11 how-to shows like This Old House and The Victory
12 Garden.

13 Q Are you familiar with the term national
14 program service?

15 A Yes.

16 Q Does WGBH produce programming that appears
17 on PBS stations through the national program service?

18 A Yes, that is basically prime time.

19 Q That is also called the national feed for
20 PBS?

21 A Yes.

22 Q Does WGBH also produce programs that are

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 syndicated to other public television stations?

2 A Yes.

3 Q Could you just briefly recount for us what
4 sort of jobs you had in your career at WGBH?

5 A Yes. I was an editor, a director, post-
6 production supervisor, producer and then I moved into
7 management.

8 Q Did you ever win any awards as an editor?

9 A Yes. I won a national Emmy award for
10 editing a four-hour television movie of the Scarlet
11 Letter for PBS.

12 Q By the way, the Emmy Award that you won,
13 were you in competition with other public broadcasters
14 only or also with commercial broadcasters?

15 A With commercial and public broadcasters.

16 Q Can you briefly tell us the names of some
17 of the programs that you worked on while you were at
18 WGBH?

19 A Front Line, American Experience, Ten
20 O'Clock News which was local, NOVA, Victory Garden,
21 This Old House, Masterpiece Theater, Mystery Theater.

22 Q As a producer of the Ten O'Clock news what

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 did you do?

2 A I had supervisory responsibility over the
3 production staff, budgetary responsibility, and I
4 wrote scripts and basically produced the evening
5 broadcast.

6 Q Were you ever an acquisitions producer?

7 A Yes. I was an acquisitions producer for
8 two series, one one-hour show and one three-hour
9 series.

10 Acquisitions producer means that we get
11 the documentaries from overseas, bring them over here
12 and rewrite them to Americanize the script, re-edit
13 them to make them less opinionated and we sometimes
14 just basically reformat them, re-record the narration
15 with an American voice.

16 Q You also had the role of coordinating
17 producer after some programs?

18 A Yes, for Front Line, the AIDS Quarterly
19 and the American Experience; that is a managerial
20 role.

21 It is supervising production and post
22 production, but it is also supervising staff and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 budgets as well as taking care of the production
2 details.

3 Q We have heard quite a bit of testimony so
4 far using the names of some of these programs. Maybe
5 you can briefly describe what Front Line is?

6 A Front Line is a one-hour long weekly
7 documentary series, public affairs based, often
8 investigative, sometimes simply expository of current
9 events.

10 Q We have also heard about The American
11 Experience. Could you briefly describe that?

12 A That is also a one-hour documentary series
13 that is historical in nature, looking at historic
14 events in the United States.

15 Q While you were at WGBH, did you become
16 familiar with the production practices and standards
17 for PBS and its producing member stations?

18 A Yes, very much so.

19 Q Was there a standard practice as to
20 whether or not music would be used in that
21 programming?

22 A There was invariably a theme, a musical

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 theme that appeared at the beginning of each show
2 under what we call the title sequence, and often time
3 under credits as well.

4 Usually, to a varying degree, depending on
5 the type of programming, there would be background
6 music as well.

7 Q Was it the practice while you were at WGBH
8 for production of programming for the national feed
9 for syndication to hire composers to create music for
10 those programs?

11 A It was not the invariable practice, but it
12 was a frequent practice, yes. We would use previously
13 recorded music for programs like the American
14 Experience because you want to use period music along
15 with the historical events.

16 But for NOVA, for example, that would be
17 originally-composed music for programs like that.

18 Q During you time at WGBH and since that
19 time, have you noticed any trend with respect to the
20 use of music in WGBH-produced programming?

21 A Yes. I have noticed a definite increase
22 in the use of music and particularly in the use of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 originally-composed music.

2 Q Could you give us an example of that?

3 A Front Line, I think, is a very good
4 example. When I started on Front Line in the early to
5 mid-Eighties, we had a policy against using music
6 because the theory was with public affairs programming
7 you don't want to manipulate the audience. Music is
8 a good tool to manipulate the audience.

9 But gradually over time, I would say,
10 1987, 1988 or so, we started noticing that the
11 commercial public affairs programs like Dateline,
12 20/20, 48-Hours, were using music and successfully so.

13 So, we thought we could start doing that
14 too. That is basically why we started using
15 originally-composed music so that we could control
16 that manipulation.

17 When the producer has control over how it
18 is composed and how long the music is and where it is
19 placed, they can restrain themselves from manipulating
20 the audience too much.

21 Q Now, could you briefly describe what your
22 jobs were at National Geographic?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 A I started as the post-production
2 supervisor for the hour-long specials and then became
3 coordinating producer and eventually supervising
4 producer for all of the hour-long programs that were
5 produced.

6 Q Can you tell us what a post-production
7 supervisor is?

8 A Post-production supervisor handles the
9 film material from the time it comes in the door from
10 the field, supervises the processing of the film, the
11 getting of it only video tape. Basically putting the
12 programs together including looking at the narration
13 recording, the script writing, the music composition,
14 stock footage. It is a more technical job than it is
15 managerial.

16 Q Could you describe for us the distinction
17 between production and post-production?

18 A Production is everything that happens
19 before, the acquisition of the film in the field, when
20 you are shooting out in the field.

21 Post-production is, the film comes back in
22 the door and it is all of the things that happen to it

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 after that point, including as I said, the writing of
2 the script, the recording of the narration, the
3 editing of images and the music and the final
4 audience.

5 Q So, the inclusion of music in a
6 documentary such as a National Geographic program is
7 part of post-production?

8 A Correct.

9 Q Can you just briefly name for us some of
10 the productions you have worked on at National
11 Geographic?

12 A I worked on almost a hundred, so I want to
13 look at my testimony to see which ones I said before.

14 Jewels of the Caribbean, Keepers of the
15 Wild, Survivors of the Skeleton Coast, The Mexicans,
16 Great Indian Railways, Mysteries Underground, that is
17 among many, many others.

18 Q Can you tell us what role, if any, in the
19 acquisition or inclusion of music in those National
20 Geographic specials?

21 A Yes. I would audition the composer's
22 tapes, basically filtering out the ones that I didn't

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 like for a particular show and presenting maybe two or
2 three to the producer and the editor of the specific
3 film.

4 Q Two or three different composers?

5 A Yes.

6 Q And that was for what purpose?

7 A So that the producer and the editor didn't
8 have to go through a whole lot of composer tapes that
9 we, on the managerial side, didn't particularly think
10 were going to be appropriate for that particular show.

11 Q So, that was in the process of hiring a
12 composer?

13 A Correct. Then, when the producer and
14 editor picked the composer for a specific show I would
15 negotiate the contract with that composer.

16 I would also get involved in the actual
17 process of creating the score.

18 Q Can you describe your experience at
19 National Geographic in helping create the score, how
20 that was done?

21 A Once the composer is hired and on board we
22 have what is called a spotting session where the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 producer, the editor and the composer sit down, go
2 through the cut of the show.

3 Q What is the cut of the show?

4 A Rough cuttings, usually 15 to 20 minutes
5 longer than the final version.

6 Q Without music in it?

7 A Yes, without music, without narration,
8 without a lot of the sound effects.

9 So, the producer and editor go through the
10 show, basically shot by shot and tell the composer
11 where they want music, how long it should be, what the
12 mood of the music should be, and how elaborate they
13 want the music to be.

14 Q What happens, in your experience, after
15 the spotting session?

16 A Then the composer goes away and composes.
17 There are several back and forth sessions where the
18 composer will come in and show us what he has done and
19 we will either say that's great or more flutes here
20 please, or louder there.

21 Then he goes back and composes the final
22 number of cues, the score basically, then delivers it

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 back to us and we take it from there.

2 Q What are the last stages?

3 A We lay it up against the picture, we lay
4 it over onto audio tape to make sure the music cues
5 stay in synch with the picture and then we mix the
6 music with the narration and the sound effects and the
7 dialogue.

8 Q In your experience, --

9 JUDGE DREYFUS: I'm sorry. He comes back
10 with a tape of the whole score?

11 THE WITNESS: He comes back with a tape of
12 the whole score.

13 JUDGE DREYFUS: And then you break it into
14 segments?

15 THE WITNESS: To put it up against the
16 picture.

17 Q How long were the National Geographic
18 documentaries you worked on?

19 A They were 54 minutes long, basically. It
20 depended on which venue it was going to air on, but we
21 made them 54 minutes long and then made them shorter
22 to fit whichever venue it was going to air on.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Q Those National Geographic documentaries
2 would have approximately how much music in them, if
3 you can state it in a generalization?

4 A Generally, between 24 and 28 minutes.
5 About 40 per cent of the show.

6 Q In addition, the National Geographic shows
7 had themes, did they not?

8 A National Geographic has a very wonderful
9 theme that lasts about a minute that went at the
10 beginning of every special.

11 Q That was in addition to the 24 to 28
12 minutes of original music.

13 Q Now, the National Geographic specials that
14 you were involved in when you worked there, where did
15 they air in the United States?

16 A On PBS and some aired on NBC.

17 Q Can you just briefly list some that aired
18 on PBS?

19 A Most of the ones that I already said, and
20 again, I am going to refresh my memory.

21 Eternal Enemies, Reflections on Elephants,
22 Hawaii-Strangers in Paradise, they were PBS films.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Q Can you list some that were on NBC?

2 A The Secret Life of Pandas, The New
3 Chimpanzees, and The Okabango Delta, among others.

4 Q Was it determined before these programs
5 were filmed whether they were going to appear on NBC
6 as distinguished from PBS?

7 A No.

8 Q When, in the time sequence you previously
9 testified to, would it be known by the people making
10 the program that a particular title was destined for
11 NBC rather than PBS?

12 A In my experience it varied, but generally
13 speaking not until we were into post-production, not
14 until we were very late into post-production. I think
15 one film was actually complete before we knew where it
16 was going to air.

17 Q So, in producing these programs for
18 National Geographic, was any difference made in terms
19 of the production values and the production choices
20 based on whether or not a film was destined for NBC
21 broadcast rather than PBS broadcast?

22 A No.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Q Who paid the composers for the original
2 music contained in those National Geographic specials?

3 A National Geographic.

4 Q Do you have any knowledge of the budgets
5 available for that purpose?

6 A Yes. We paid between \$12 and \$18
7 thousand, depending on how many acoustical musicians
8 needed in any given show. I would say generally
9 speaking, it was about \$14 thousand.

10 Q Was additional money paid to composers if
11 their music was to appear on PBS as opposed to NBC?

12 A No, the music budget was the same.

13 Q Did National Geographic have available to
14 it any composer that it wanted to hire, or did it have
15 a list of composers? How did you go about choosing?

16 A We had composer audition tapes come in
17 over the transom, but the specials had a list of
18 composers that we tried to use over and over again
19 because they worked well for us.

20 So, we had sort of an 'A' list for the
21 specials and a 'B' list for the non-specials and we
22 chose from the 'A' list for the one-hour long

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 specials.

2 Q Do you know of any examples of composers
3 who worked on National Geographic specials that
4 appeared on both NBC and PBS?

5 A Yes, I do, and again I would like to refer
6 to my testimony.

7 Q Mark Adler scored both White House which
8 aired on PBS and the Last Czar on NBC. Rick Bates did
9 Heart of Africa which aired on PBS and Chimpanzees
10 which aired on NBC. And the Insects, which is a group
11 from England, scored Hawaii on PBS and Life on
12 the Edge on NBC.

13 Q From your point of view, was there any
14 difference in terms of the work involved as to whether
15 Mr. Adler's or Mr. Bates' work appeared on the one
16 outlet rather than the other, NBC versus PBS?

17 A No difference.

18 MR. SALZMAN: No further questions.

19 CHAIRPERSON GRIFFITH: All right. Mr.
20 Schaeffer, do you have any questions, sir?

21 MR. SCHAEFFER: I have no questions.

22 CHAIRPERSON GRIFFITH: Thank you. Mr.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Weiss?

2 THE WITNESS: Thank you.

3 CROSS EXAMINATION

4 BY: MR. WEISS

5 Q Ms. McFadden, you mentioned that the
6 typical music budget for a one-hour National
7 Geographic special ran from \$12 to \$18 thousand and
8 was roughly \$ 14 thousand, correct?

9 A Correct.

10 Q What did this money pay for?

11 A It paid the composer's fee and the cost of
12 recording.

13 Q Approximately what proportion of the money
14 paid in the music budget went to the composer's fee?

15 A I don't know. We gave the whole thing to
16 the composer and he allotted it himself.

17 Q So, when you said that roughly \$14
18 thousand was the music budget, that was the amount
19 paid to the composer and the composer was responsible
20 for creating the music and composing the music and
21 whatever he had left went into his pocket, in essence?

22 A Correct. I mean he split it out between

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 his fee and the actual hard costs.

2 Q I believe another BMI witness will be
3 testifying that roughly a third of the cost that he
4 receives in up-front payments for composing go to his
5 costs and the remainder goes to him.

6 Does that sound accurate to you, in your
7 experience?

8 A I don't know. In my experience, from
9 just having talked to the composers, they allotted it
10 however they wanted to, as long as they satisfied our
11 aesthetic requirements.

12 Q So, I understand then, irrespective of
13 whatever amounts of money the composer earns from BMI
14 or ASCAP from performing rights royalties, they earn
15 a certain amount of money from National Geographic up
16 front when they create the program, correct?

17 A Correct.

18 Q Does National Geographic have a music
19 publishing company?

20 A Yes, I believe they have two.

21 Q One ASCAP and one BMI, correct?

22 A Correct.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Q The determination whether to use the ASCAP
2 or BMI publishing company for a particular program is
3 based upon the affiliation of the composer who is
4 writing the music.

5 Let me ask that slightly differently.
6 What does a music publishing company do for National
7 Geographic?

8 A I don't know.

9 Q Are you aware that a music publishing
10 company, in general, collects royalties for
11 performances of music in the National Geographic
12 programming?

13 A I am generally aware that that is what
14 ASCAP and BMI do.

15 Q They pay National Geographic's music
16 publishing company for performances of works that they
17 have published on public or commercial television,
18 correct?

19 A I am afraid I really don't know the
20 workings, I really don't.

21 Q Are you aware that when a composer creates
22 works for National Geographic, National Geographic's

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 publishing company retains what is called the
2 publishing share of the music performing rights?

3 MR. SALZMAN: Object to the form.

4 CHAIRPERSON GRIFFITH: The form of the
5 question?

6 MR. SALZMAN: As being argumentative,
7 assuming a fact hat is not in evidence.

8 CHAIRPERSON GRIFFITH: Objection is
9 overruled.

10 THE WITNESS: I am sorry, you will have to
11 say it again.

12 Q Am I correct that music is created for a
13 National Geographic program, National Geographic's
14 publishing company retains what is commonly called the
15 publishing share of the music performing rights,
16 correct?

17 A I guess what I can say is, when I fill out
18 the music cue sheets in that little area, I write down
19 the name of National Geographic's publishing company
20 and that is truly all I know about how it works.

21 Q So, you don't have any information as to
22 how payments are made or what payments are made to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 that music publishing company when those compositions
2 are performed?

3 a Correct, I have no knowledge.

4 Q By the way, the music on National
5 Geographic's programming hasn't changed significantly
6 over the past 10 to 15 years, has it?

7 A The amount of music?

8 Q The amount of music, the nature of the
9 music used.

10 A Well, I don't know because I was only
11 there for three and a half years. I would say that it
12 did not change during those three and a half years I
13 was there.

14 Q Did you have any understanding that it had
15 been significantly different prior to your arriving at
16 National Geographic than it was during your tenure
17 there?

18 A That is my impression.

19 Q That it was the same?

20 A That it was basically the same.

21 Q And that the process of creating music for
22 including in a National Geographic program was

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 essentially the same for many years before you arrived
2 at National Geographic?

3 A Well, technically the process changed a
4 lot even while I was there.

5 But in terms of amount of music used and
6 the mood and theme of it, no, I would say there was
7 not change.

8 Q You testified that National Geographic
9 specials have appeared on both commercial broadcast
10 television, the NBC network and on public television
11 correct?

12 A Correct.

13 Q You are not suggesting that most programs
14 that appear on public television also appear on
15 commercial broadcast television, are you?

16 A I have no knowledge of that.

17 Q Why don't we look at BMI Exhibit 66 which
18 is a copy of your vitae.

19 A Okay.

20 Q If you look down the first, second and
21 third page there are a number of programs listed here
22 that you worked on while you were at WGBH, correct?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 A Yes.

2 Q If you look down this list of programs, is
3 it accurate to say that the vast majority of them are
4 programs that appeared on public television and not on
5 commercial broadcast television?

6 A Yes.

7 Q In fact, almost exclusively, the programs
8 you worked on at WGBH appeared solely on public
9 television not on commercial television.

10 A Correct.

11 Q You testified on page three of your
12 written testimony that when National Geographic
13 creates a document, the finished film is always
14 approximately 54 minutes in length, correct?

15 A Correct.

16 Q And when the National Geographic special
17 airs on public television, the 54-minute version tends
18 to be the one that is shown, correct?

19 A Correct.

20 Q When it is created for NBC, however, you
21 state that the version is edited down to 48 minutes,
22 a six minute shorter version than typically appears on

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 public television, correct?

2 A Correct.

3 Q What accounts for that six minute
4 difference?

5 A Commercials.

6 Q NBC inserts commercials through six
7 minutes of that programming that PBS does not insert,
8 correct?

9 A Correct.

10 Q You haven't conducted any in-depth
11 analysis of music use between commercial and public
12 television, have you?

13 A No.

14 Q You haven't looked at any analysis of
15 public television music use over the course of time,
16 have you?

17 A Other than what I know from my own 20
18 years of experience.

19 Q Your own experience to which you testified
20 is simply anecdotal. It doesn't reflect any analysis
21 or comprehensive study, does it?

22 MR. SALZMAN: I object.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 CHAIRPERSON GRIFFITH: On what basis.

2 MR. SALZMAN: It is argumentative. She
3 testified that it was her experience; she wasn't
4 recounting anecdotes.

5 CHAIRPERSON GRIFFITH: Overruled. Thank
6 you.

7 A I am sorry, ask that again?

8 Q I was saying that your testimony was
9 simply as the changes in music use was simply
10 anecdotal and not the reflection of any study or
11 analysis done comprehensively of music use on public
12 television, is it?

13 A Correct.

14 Q You never worked for a commercial
15 television station or a commercial television network,
16 have you?

17 A Not on staff, no.

18 Q When you talked about your experience,
19 that experience reflected your work at WGBH and not
20 any experience at 350 other public television
21 stations, correct?

22 A I have worked at other public television

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 stations in my freelance capacity.

2 Q Well, if you looked at page two of your
3 testimony, it says that you became aware during your
4 time at WGBH of the growing importance of music for
5 WGBH programming, correct?

6 A Correct.

7 Q So, basically, your testimony reflected
8 your experience and knowledge principally when you
9 worked at WGBH?

10 A Principally from WGBH.

11 Q By the way, you mentioned that Front Line
12 began using music in the background which it hadn't
13 used when the program was first broadcast?

14 A Correct.

15 Q And that change took place in the 1980's?

16 A Correct.

17 Q Has there been subsequent change to the
18 nature of music used in Front Line that you are aware
19 of?

20 A When I watch it on the air I see it
21 growing even now, yes. And having talked to my
22 friends who are still producers there, I know that tit

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 is still growing.

2 THE WITNESS: I have no further questions.

3 CHAIRPERSON GRIFFITH: All right. Any
4 redirect?

5 MR. SALZMAN: No.

6 CHAIRPERSON GRIFFITH: All right, ma'am,
7 you may step down. Thank you very much. We are going
8 to commence at 9:30 a.m. on Thursday.

9 MR. SCHAEFFER: I have a little bit of
10 housekeeping if I could just detain you for a moment.

11 I have Mr. Boyle's revised testimony which
12 I want to give you. Shall we file that with you now
13 or later?

14 CHAIRPERSON GRIFFITH: I think it is to be
15 filed at the Copyright Office.

16 MR. SCHAEFFER: But I have copies for your
17 gentlemen, so if you want it I can give it to you now.

18 CHAIRPERSON GRIFFITH: Yes, that's fine.

19 MR. SCHAEFFER: I think the originals are
20 being brought down by Mr. Shore.

21 CHAIRPERSON GRIFFITH: All right.

22 JUDGE DREYFUS: This is an entirely --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 MR. SCHAEFFER: It is revised.

2 CHAIRPERSON GRIFFITH: All right, anything
3 else, Mr. Schaeffer?

4 MR. SCHAEFFER: Yes. We have the letter
5 from Ms. Bander which we will file and we have a
6 proposed stipulation which we will show.

7 CHAIRPERSON GRIFFITH: On Thursday now, we
8 are going to have in addition to Dr. Boyle --

9 MR. KLEINBERG: Michael Bacon and Roy
10 Epstein.

11 MR. SCHAEFFER: Do you want to go first?

12 MR. KLEINBERG: Mr. Bacon has to go first;
13 we are setting this within his schedule.

14 CHAIRPERSON GRIFFITH: It would probably
15 be better to finish BMI case if we can.

16 MR. SCHAEFFER: That would be fine; we
17 would like to do that.

18 CHAIRPERSON GRIFFITH: All right. Thank
19 you very, very much. We will see you Thursday morning
20 at 9:30 a.m.

21 (Whereupon, the proceedings adjourned at
22 12:12 p.m.)

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

CERTIFICATE

This is to certify that the foregoing transcript in
the matter of: Hearing: Adjustment of the Rates for
 Noncommercial Educational
 Broadcasting Compulsory License,
 Docket No. 96-6 CARP NCBRA

Before: Library of Congress
 Copyright Arbitration Royalty Panel

Date: March 17, 1998

Place: Washington, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
typewriting.

A handwritten signature in dark ink, written over a horizontal line. The signature is stylized and appears to be "K. S. [unclear]".

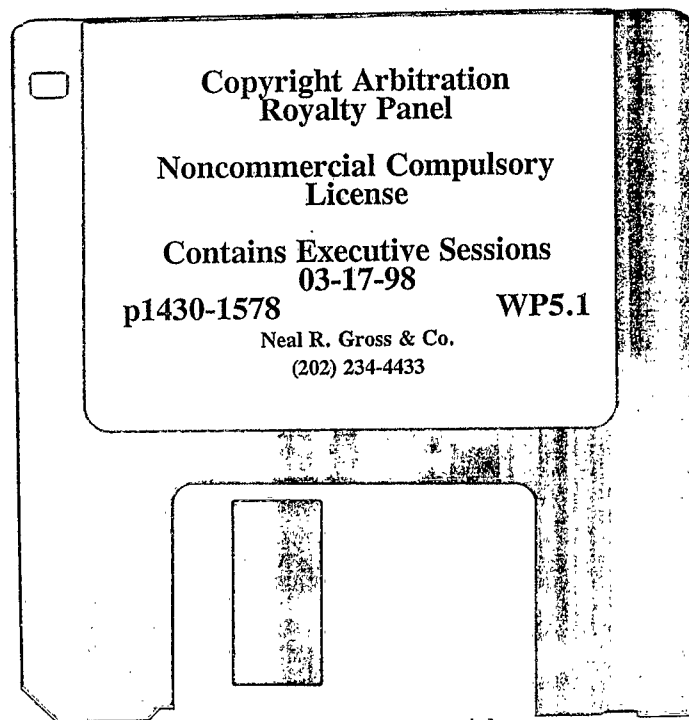
EXCEPTION BOX

DATE: 2/3/19

DOCUMENT PROCESSOR: Nash

DOCKET NUMBER: 36-6

ISSUES: Floppy disk - copy of exec sessions



Copyright Arbitration
Royalty Panel

Noncommercial Compulsory
License

Contains Executive Sessions
03-17-98
p1430-1578 WP5.1

Neal R. Gross & Co.
(202) 234-4433